

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 5/2/08
Civil Service Commission
CB

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

RALPH COLLINS,
Appellant

v.

TOWN OF WINTHROP,
Respondent

Case No.: D-06-12

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on May 1, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated March 18, 2008. Neither party filed written objections to the Magistrate's proposed decision as allowed under 801 CMR 1.01 (11) (c). The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby **allowed**; the 2-day suspension is overturned; and the Appellant is to be restored to his position without loss of pay or benefits.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Taylor, Commissioners) on May 1, 2008.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Jaime DiPaola-Kenny, Esq. (for Appellant)
Howard L. Greenspan, Esq. (for Appointing Authority)
Natalie S. Monroe, Esq. (DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

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March 18, 2008

Christopher C. Bowman, Commissioner
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Jaime DiPaola-Kenny, Esq.
Associate General Counsel
AFSCME Council 93
8 Beacon Street
Boston, Massachusetts 02108


Howard L. Greenspan, Esq.
200 Broadway, Suite 304
Lynnfield, Massachusetts 01940

Re: *Ralph Collins v. Town of Winthrop,*
Docket Nos. D-06-12/CS-07-1104

Dear Mr. Bowman, Ms. DiPaola-Kenny and Mr. Greenspan:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Very truly yours,


Natalie S. Monroe
Administrative Magistrate

Enclosure

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2008 MAR 18 P 3:58
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Ralph Collins,
Appellant,

v.

Docket No. D-06-12
DALA No. CS-07-1104

Town of Winthrop,
Appointing Authority.

Appearance for Appellant:

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AFSCME Council 93
8 Beacon Street
Boston, Massachusetts 02108

Appearance for Appointing Authority:

Howard L. Greenspan, Esq.
200 Broadway, Suite 304
Lynnfield, Massachusetts 01940

Administrative Magistrate:

Natalie S. Monroe, Esq.

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

2008 MAR 18 P 3:58

RECEIVED

RECOMMENDED DECISION

Ralph Collins is appealing the Town of Winthrop's decision to suspend him for two days without pay for allegedly leaving work without permission on July 26, 2005.

Mr. Collins appealed under the provisions of G.L. c. 31, § 43.

I held a hearing on December 3, 2007, at the offices of the Division of Administrative Law Appeals ("DALA"), 98 North Washington Street, Boston. The Town of Winthrop called two witnesses: David Hickey and Ralph Collins. Mr. Collins called three witnesses: Linda Vatalaro, Roger McAvoy and Frank Daloia. Six exhibits (Exhibits 1-6) were entered into evidence. During the hearing, moreover, the parties

stipulated that Mr. Collins timely appealed the decision to suspend him. There are two cassette tapes of the hearing.

Mr. Collins submitted a post-hearing brief on January 10, 2008. The Town of Winthrop submitted a post-hearing brief on January 17, 2008, after which the record closed.¹

FINDINGS OF FACT

Based on the documents entered into evidence (Exhibits 1-6), and the testimony of Ralph Collins, Frank Daloia, David Hickey, Roger McAvoy and Linda Vatalaro, I make the following findings of fact:

1. Ralph Collins began working for the Town of Winthrop (the "Town") in 1978. (Testimony of Ralph Collins).
2. In July 2005, Mr. Collins was a Working Foreman in the Town's Department of Public Works (the "DPW"). He had asthma, high blood pressure and a tumor on his adrenal gland. He was taking Albuterol and Advair for his asthma. At the time, Mr. Collins had accrued over sixty-nine sick days. (Testimony of Ralph Collins; Exhibit 5).
3. In July 2005, David Hickey was the DPW Director and Paul Camilli was the Operations Manager. The Operations Manager is second-in-command at the DPW. (Testimony of David Hickey).
4. In July 2005, the DPW had the following policy that employees had to follow when they needed to leave work due to an illness: the employee had to report to the DPW office and tell Linda Vatalaro, a Senior Clerk at the DPW, that he (or she) was

¹ The deadline for submitting post-hearing briefs was January 10, 2008. Mr. Collins did not object to the Town's late brief, however.

leaving work sick. Ms. Vatalaro would then make a record that the employee went home sick. (Testimony of Ralph Collins, Linda Vatalaro, Roger McAvoy and Frank Daloia).

5. Employees also were expected to tell Mr. Camilli or a supervisor before leaving work due to illness. If neither Mr. Camilli nor a direct supervisor was in the DPW Yard (where the DPW office and garage are located), the employee was expected to talk to an indirect supervisor or the most-senior employee available. This requirement was not strictly enforced; as long as the employee told Ms. Vatalaro he was leaving, the employee would not be disciplined for failing to talk to Mr. Camilli or a supervisor before going home sick. (Testimony of Ralph Collins, Linda Vatalaro, Roger McAvoy, David Hickey and Frank Daloia).

6. In July 2005, employees were not required to call Mr. Camilli or Mr. Hickey (the DPW Director) on their cell phones before going home sick. (Testimony of David Hickey, Ralph Collins, Linda Vatalaro, Roger McAvoy and Frank Daloia).

7. On July 26, 2005, Mr. Collins reported to work at approximately 6:30 a.m. Mr. Hickey assigned Mr. Collins to chip branches at the "compost site." (Testimony of David Hickey and Ralph Collins).

8. The compost site is located on Kennedy Road in Winthrop; it is not located at the DPW Yard. (Testimony of Ralph Collins).

9. The compost site is a paved area that measures approximately fifty yards by fifty yards. The site contains a wood chipper as well as piles of leaves, branches, yard waste and trash. (Testimony of Ralph Collins).

10. The compost site is dusty. There are no trees, and thus no shade, at the site. (Testimony of Ralph Collins).

11. Mr. Collins did not like working at the compost site and had complained about the conditions at the site in the past. (Testimony of Ralph Collins, David Hickey and Frank Daloia).

12. On July 26, 2005, Mr. Collins chipped branches at the compost site from approximately 6:30 a.m. to 9:00 a.m. By 9:00 a.m., it was approximately ninety degrees outside and very humid. The compost site was dusty. (Testimony of Ralph Collins and Linda Vatalaro).

13. At around 9:00 a.m., Mr. Collins began to feel ill. He started coughing and had dry heaves. He was sweating profusely, dizzy and slightly light-headed. He was red in the face and drenched in sweat. He did not look well. (Testimony of Ralph Collins, Linda Vatalaro and Frank Daloia).

14. Mr. Collins asked a co-worker to drive him to the DPW Yard. When he got to the DPW Yard, he went into the garage to look for his supervisor, Edwin Wright. (Testimony of Ralph Collins).

15. Mr. Wright was not in the garage. Mr. Collins therefore talked to Roger McAvoy, the General Foreman of the DPW's Water Department. Mr. McAvoy is an indirect supervisor of Mr. Collins. (Testimony of David Hickey, Roger McAvoy and Ralph Collins).

16. Mr. Collins told Mr. McAvoy that he did not feel well and that he was going home. Mr. McAvoy told Mr. Collins that he would tell Mr. Camilli that he (Mr. Collins) had gone home sick. Mr. Camilli was not at the DPW Yard at the time; he was at Water Tower Hill in Winthrop. (Testimony of Roger McAvoy and Ralph Collins).

17. Mr. McAvoy did not consider his conversation with Mr. Collins to be unusual because it was normal procedure for an employee to tell a supervisor, and then Ms. Vatalaro, before going home sick. He therefore believed Mr. Collins was following the normal procedure for going home sick. (Testimony of Roger McAvoy).

18. Mr. Collins also saw Frank Daloia, a Senior Mechanic at the DPW, in the garage. Mr. Collins was sweating profusely and he looked "awful." Mr. Collins told Mr. Daloia that he did not feel well and that he was going home sick. He also told Mr. Daloia that he was going to stop at the office first. (Testimony of Ralph Collins and Frank Daloia).

19. After speaking to Messrs. McAvoy and Daloia, Mr. Collins went into the DPW office. He was sweating and a little flushed. He told Ms. Vatalaro that he was going home sick. Ms. Vatalaro said "Okay," and logged the sick time in her records. (Testimony of Ralph Collins and Linda Vatalaro).

20. Mr. Collins did not use profanity when he spoke to Ms. Vatalaro. (Testimony of Linda Vatalaro and Ralph Collins).

21. Mr. Hickey was not at the DPW Yard when Mr. Collins spoke to Ms. Vatalaro. (Testimony of David Hickey, Ralph Collins and Linda Vatalaro).

22. After speaking with Ms. Vatalaro, Mr. Collins left the DPW Yard. He drove his motor scooter to Bolster's Gas and Convenience Store, which was on his way home, to buy a cold drink. Susan Bolster, who owns the store and also is a Town Selectwoman, was working in the store that day. (Testimony of Ralph Collins).

23. While he was in the store, he saw Selectwoman Bolster, who asked him what he was doing. He told her that he had gotten sick while working at the compost site.

He told her the compost site was “terrible” and “brutal” that day because of the heat.

(Testimony of Ralph Collins).

24. After leaving Bolster’s, Mr. Collins drove to Water Tower Hill, which also was on his way home, to tell Mr. Camilli that he was going home sick. Mr. Camilli had just left Water Tower Hill, so Mr. Collins did not talk to him. (Testimony of Ralph Collins).

25. After leaving Water Tower Hill, Mr. Collins drove home, took a shower and rested for several hours. (Testimony of Ralph Collins).

26. Mr. Hickey returned to the DPW Yard between 9:00 a.m. and 9:30 a.m., after Mr. Collins had left. (Testimony of David Hickey).

27. When Mr. Hickey returned to the DPW Yard, Ms. Vatalaro told him that Mr. Collins had gone home sick. (Testimony of David Hickey and Linda Vatalaro).

28. Later that same day, Mr. Hickey suspended Mr. Collins for two days without pay for “leaving the work site ... without justification or approval.” (Exhibit 1; Testimony of David Hickey).

29. On July 28, 2005, Mr. Collins went to see his primary care physician, Dr. Pransky, because he still did not feel well. Dr. Pransky advised him to take a week off from work. (Exhibit 6; Testimony of Ralph Collins).

30. Mr. Collins timely appealed Mr. Hickey’s decision to suspend him for two days without pay. (Testimony of Ralph Collins; Stipulation).

31. On August 10, 2005, the Town held a hearing concerning Mr. Collins’ suspension. (Exhibit 2).

32. On October 3, 2005, the Town issued a decision upholding Mr. Hickey's decision. (Exhibit 2).

33. Mr. Collins timely appealed the Town's decision. (Stipulation).

CONCLUSION AND RECOMMENDATION

The Civil Service Commission's responsibility is to determine whether the Town of Winthrop has proven, by a preponderance of evidence, just cause for the disciplinary action taken. See G.L. c. 31, § 43; School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, 622 (1997). Massachusetts courts have interpreted "just cause" to mean that the disciplined employee must be "guilty of substantial misconduct that adversely affected the public interest by impairing the efficiency of public service." Murray v. Second Dist. of E. Middlesex, 389 Mass. 508, 514, 451 N.E.2d 408, 412 (1983). After reviewing all of the evidence, I conclude that the Town has not met its burden of establishing just cause for suspending Mr. Collins for two days without pay. In particular, the Town failed to show that Mr. Collins left work on July 26, 2005 without "justification or approval."

On July 26, 2005, Mr. Collins reported to work on time. When he was assigned to chip branches at the compost site, he went to the site and chipped branches for approximately two and a half hours. At approximately 9:00 a.m., he began to feel sick. He started coughing and had dry heaves. He was sweating profusely, dizzy and slightly light-headed. He was flushed and drenched in sweat.

Mr. Collins asked a co-worker to drive him to the DPW Yard. He then followed the established procedure for going home sick by telling the Senior Clerk, Linda Vatalaro, that he was going home sick. In July 2005, DPW employees were not always

required to inform a supervisor before going home sick. Even assuming this was a requirement, however, Mr. Collins fulfilled that obligation as well. Before he left, he told his indirect supervisor, Roger McAvoy, that he was leaving work sick. It was appropriate for Mr. Collins to tell Mr. McAvoy because his direct supervisors – Messrs. Wright, Camilli and Hickey – were not at the DPW Yard when Mr. Collins went home sick. Furthermore, as of July 26, 2005, Mr. Collins had accrued approximately sixty-nine days of sick time; he therefore had sufficient sick time to use on that date.

The Town contends that Mr. Collins failed to call either Mr. Hickey or Mr. Camilli on their cell phones before leaving work. In July 2005, however, DPW employees were not required to telephone Mr. Hickey or Mr. Camilli before going home due to illness.

The Town also contends that Mr. Collins was not sick, but instead walked off the job because he was angry about having to work at the compost site. The Town presented evidence that Mr. Collins had complained about working at compost site in the past. Additionally, Mr. Collins told Selectwoman Bolster that it was “brutal” and “terrible” at the compost site because of the heat that day. Moreover, Mr. Collins was able to drive his motor scooter out of the DPW Yard, he made two stops on his way home, and he did not seek medical care the day he left work.

On the other hand, three percipient witnesses testified that Mr. Collins told them that he did not feel well and that he was going home sick. Two of these witnesses testified that Mr. Collins appeared to be ill; he was flushed, sweating profusely and looked “awful.” None of the three witnesses testified that Mr. Collins appeared angry or complained about having to work at the compost site. Moreover, Ms. Vatalaro

specifically denied that Mr. Collins used profane language or said anything derogatory about the DPW. Furthermore, Mr. Collins had asthma, which was exacerbated when he worked at the compost site.

Balancing all of the evidence, I conclude that Mr. Collins did feel ill on July 26, 2005, and that he did not walk off the job because he was angry about having to work at the compost site. In this regard, I do not credit Mr. Hickey's testimony that Mr. Collins told Ms. Vatalaro that he (Mr. Collins) was "sick of this shit" and that he was walking off the job. Mr. Hickey was not in the DPW office when Mr. Collins reported in sick to Ms. Vatalaro and Ms. Vatalaro explicitly denied Mr. Hickey's version of events.

Moreover, telling Selectwoman Bolster that the heat made it "terrible" and "brutal" at the compost site is not evidence that Mr. Collins walked off the job in anger or that he was pretending to be sick. Mr. Collins testified credibly that Bolster's convenience store is on his way home and that he stopped there to buy a cold drink, not to complain to the Selectwoman. While the Town submitted the Town Hearing Officer's account of the discussion, I do not consider it. DALA is required to hold a *de novo* hearing and determine the facts independently. In any event, Selectwoman Bolster did not testify at the Town's hearing and Mr. Collins denied the Town Hearing Officer's account. Thus, even if I could consider the report, it is not reliable evidence and I would give it no weight.


Finally, Mr. Collins' actions after he left the DPW Yard do not establish that he was malingering on July 26, 2005. Instead, his conduct goes to the seriousness of his illness; it shows that he was not gravely ill, or so sick that he could not drive a motor scooter.

In sum, the evidence shows both that Mr. Collins was ill on July 26, 2005, and that he followed the proper DPW procedure for leaving work due to illness. As a result, Mr. Collins did not leave work without "justification or approval" and therefore was not guilty of "substantial misconduct." Murray, 389 Mass. at 514, 451 N.E.2d at 412. Thus, the Town failed to meet its burden of establishing just cause for disciplining Mr. Collins. School Comm. of Brockton, 43 Mass. App. Ct. at 488, 684 N.E.2d at 622.

For the foregoing reasons, I recommend that the Town of Winthrop's decision to suspend Mr. Collins for two days without pay for leaving work without "justification or approval" be reversed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Dated: March 18, 2008


Natalie S. Monroe
Administrative Magistrate